A

HO SUE SAN v. HOVID BHD & ORS

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN N PARAMAGURU JCA
LIM CHONG FONG JCA
CHOO KAH SING JCA
B [CIVIL NO: W-02(NCC)(A)-162-01-2023]
20 JUNE 2024

Abstract – *(i) For a quasi-partnership to exist, three elements must be present: a personal relationship, an agreement to participate in the business, and restrictions on the transfer of shares; (ii) A relationship of mutual trust and confidence must be built over time and is not created solely through agreements; (iii) A legitimate expectation is not a cause for action under s. 346 of the Companies Act 2016 but rather a consequence of equitable restraint in certain circumstances; (iv) Oppressive conduct must be based on a breach of equitable bargain or a statutory duty.*

COMPANY LAW: *Oppression – Oppressive conduct – Fallout between majority shareholders – Parties locked in stalemate over disagreements on shareholders' agreement – Allegation by one shareholder that another shareholder had conducted itself in manner that unfairly discriminated and prejudiced – Whether allegation proven – Circumstances of commercial relationship between shareholders – Whether there was commercial relationship in nature of quasi-partnership – Whether there was relationship of mutual trust and confidence – Whether there was legitimate expectation – Ebrahimi v. Westbourne Galleries Ltd – Companies Act 2016, s. 346(1)(b)*

The appellant was the founder of the first respondent company. In 2017, the appellant had met a private investment group known as TAEL Group ('TAEL'). The appellant and TAEL entered into an agreement known as the agreement on voluntary general offer ('VGO1') as part of the privatisation exercise. The third respondent was incorporated and used as a special vehicle for TAEL to represent its interest in delisting exercise and its investment in the first respondent. The appellant and TAEL signed a second VGO ('VGO2'), which had the effect of amending and restating the VGO1 in its entirety. There were 25 key reserved issues set down in the VGO2 in relation to the management, dealings and powers of the affairs of the first respondent (and two other companies). It was the understanding of the parties that any action taken by any party, that was not in accordance with any of the 25 key reserved issues, shall be a breach of the VGO2. It was also stated that a resolution to transact any of the key reserved issues shall be valid only if passed by the affirmative vote and approved by the appellant and TAEL, being the parties. From the beginning, TAEL had made known to the

appellant that its investment interest in the first respondent was only for a period of a five-year term and after the fifth year, TAEL would exit from the investment. However, after the five-year term ended, TAEL wanted to exit the investment but could not; the appellant refused to let TAEL exit because the parties did not execute the shareholders' agreement ('SA'). TAEL had no choice but, through the second respondent as the named shareholder, to issue a requisite notice, calling the existing directors to convene an extraordinary general meeting ('EGM') for the appointment of six more directors on the Board of the first respondent. By having six more directors on the Board, the second respondent would be able to pass resolution(s) to the effect of paving the way for a trade sale of the third respondent's beneficial shares in the first respondent. However, the appellant felt that the conduct of issuing the requisition notice and the proposed resolution, if passed, would have a cumulative oppressive effect against him; this would, in effect, be in breach of an equitable bargain between the parties in the VGO2. There was a fallout between the appellant and the third respondent, another majority shareholder in the first respondent, in relation to a protracted disagreement over the finalisation of the terms of a SA in relation to the respective parties' interest in the first respondent. At the High Court, the appellant sought, *inter alia*, the following orders: (i) a declaration that the third respondent had conducted itself in a manner that unfairly discriminated or otherwise prejudiced the appellant and/or in regard of the interests of the plaintiff; (ii) a declaration that the requisition notice was unlawful as the proposed resolution unfairly discriminated and/or was otherwise prejudicial to the plaintiff; and (iii) an order that the third respondent shall sell its beneficial shares in the first respondent to the appellant at a value to be determined by an independent valuer. In refusing to grant the orders prayed, the High Court Judge concluded that: (i) there could not be any equitable bargain which could give rise to any legitimate expectation nor was there a breach of such equitable bargain; and (ii) the oppressive conduct complained of, which was premised on a breach of equitable bargain, could not be made out and what was left, if any, would be a breach of the VGO2 which would not suffice to form the basis for an oppression action under s. 346(1)(b) of the Companies Act 2016 ('Act'). Hence, the present appeal. In support of his appeal, the appellant submitted that: (i) there was an equitable bargain and that equitable bargain had been broken by the third respondent/TAEL; (ii) there was loss of mutual trust and confidence; and (iii) there was a legitimate expectation that the third respondent/TAEL would adhere to the agreement of the VGO2 in that the parties' representatives to the Board would be in the ratio of 2:2. The proposed resolution, if passed, would go contrary to the legitimate expectation.

Held (dismissing appeal)
Per Choo Kah Sing JCA (for the majority):

(1) The appellant's application was premised on the existence of a commercial relationship in the nature of quasi-partnership. In order to determine whether there was a relationship in the nature of a quasi-partnership, the circumstances of the commercial relationship between the shareholders must be considered, including but not limited to, whether there existed one or more of the three elements as propounded in *Ebrahimi v. Westbourne Galleries Ltd* ('*Ebrahimi*'), namely: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element would often be found where a pre-existing partnership had been converted into a limited company ('first element'); (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business ('second element'); and (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he could not take out his stake and go elsewhere ('third element'). (paras 34 & 43)

(2) The facts in the present case could hardly come near to the circumstances for the first element. The relationship between the parties was purely a commercial relationship. There was no personal relationship involving mutual confidence between the shareholders. The VGO2 was the agreement, as well as the understanding, of the parties. However, that agreement was not in reference to participation in the conduct of the business of the company; it merely set down the broad mechanism for the way forward and the structure of the shareholding and numbers of Board members. It did not deal with the conduct of the business of the company. The 25 key reserved issues were a mixture of the powers and dealings and internal management of the company. What was material was the appellant was in control of the management of the first respondent company before TAEL came into the picture and continued to be in control after that; the appellant never lost control of the management of the first respondent company. Although the third respondent was a majority shareholder, it did not participate in the conduct of the business. The VGO2, by itself, was not an agreement or understanding in relation to the participation of the shareholders in the conduct of the business. The third respondent was not interested to participate in the conduct of the business. The third respondent regarded its investment as a short-term investment, *ie*, a five-year term investment. The appellant failed to establish there was an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business of the company, *ie*, the second element. The restriction in the third element was one where members were not

allowed to walk out from the association, and the restriction remained binding even if there was a fallout for reasons as mentioned – confidence in the association was lost or a member was removed from management. This element postulated that the members came together with a mutual understanding that the association shall remain and that no member could leave even if that member falls out with the rest. However, there was no restriction to prohibit members from walking out from the company. Rule 35 of the first respondent merely stated that the Board may decline to register a transfer of shares to a person who they do not approve. There was no restriction in the sense that a member could not sell; rather, r. 35 gave the discretionary power to the Board to approve or decline to register a transfer of shares to a person who will become a member. Therefore, r. 35 did not satisfy the third element. The appellant failed to establish a relationship in the nature of quasi-partnership on all three counts relied on by the appellant. (paras 34, 44-46 & 48-49)

(3) A relationship of mutual trust and confidence must be built upon the test of time, not by mere agreements to engage to do something together. The VGO1 and VGO2 were merely agreements to set down the broad mechanism for the way forward and the structure of the shareholding between the appellant and TAEL. The nature of the VGOs was purely commercial in nature for the parties to come to terms in an investment plan. The VGOs do not establish a relationship of mutual trust and confidence as alleged by the appellant. A relationship of mutual trust and confidence could be inferred, although not necessarily always the case, from the existence of a relationship of a partnership before a company is incorporated. The parties must show there was some past relationship in the sharing of responsibility and profit of the business before formation of a limited company. With regard to the submission that the appellant gave up his majority stake of the listed company in reliance of the promise made by the third respondent/TAEL, therefore, a relationship of mutual trust and confidence was established, the appellant should have known that once the company became delisted and went private, he would no longer hold a majority stake and that the third respondent would be the majority shareholder. The appellant, being an astute businessman, must have considered this calculated risk. The appellant got what he actually wanted *vis-a-vis* to bring the public listed company private and to have a greater control of the management and finance of the first respondent, as a result of TAEL's investment. In actual fact, the appellant never lost control of the management of the first respondent. The appellant was, and still is, the prime mover of the business of the first respondent. The appellant continued managing the affairs of the business after TAEL's involvement. Although on the face it may look as if the appellant had given up his majority stake, the truth was the appellant actually gained from the association with TAEL. The

parties had not premised their relationship on mutual trust and confidence; the 'marriage' was rather a business opportunity for both sides to proceed with a win-win endeavor to delist the first respondent. (paras 51-55)

(4) Legitimate expectation was not a cause for an application under s. 346 of the Act but, rather, it was a consequence of an equitable restraint in a case where equitable consideration applies. The submission of legitimate expectation could not be a cause to establish that there was unfairness to the appellant in his application under s. 346(1)(b) of the Act. (paras 57 & 58)

(5) The proposed resolution was, in fact, consistent with the third respondent's bargain in the VGO2, *vis-a-vis* to exit after five years as planned. The appellant was, at all times, aware that the third respondent/TAEL would end the business venture after the five-year term ended; that was the expectation the appellant should have prepared himself for after the end of the five-year term. The proposed resolution could not be regarded as being unfair to the appellant in commercial terms as the intention of the third respondent, *ie*, to exit from the investment after five years, was made known to the appellant from day one. The appellant's main objective in filing the s. 346 application was to obtain an order that would have the effect of enforcing the terms of the SA that the appellant wanted and which the third respondent rejected. The appellant could not pressure the third respondent to sell its majority shares to the appellant in accordance to his terms in the absence of a SA that had been agreed by the parties. The court should not be used as a means to an end *vis-a-vis* to obtain a court order for a bargain that the appellant failed to reach. The stalemate between the parties was purely a commercial dispute which ought to be settled within the four corners of the commercial documents. (paras 59 & 62)

Per Lim Chong Fong JCA (dissenting):

(1) Whilst every case of minority oppression is very much fact-centric, there is, however, no 'straight jacket' solution. That notwithstanding, there is a vital distinction between an oppression action based on s. 346(1)(a) of the Act, where the alleged oppressive act must concern the affairs of the company, and that based on s. 346(1)(b) of the Act where the actual or threatened act or resolution of a member must be discriminating or prejudicial to another member who has been aggrieved. These must not be conflated. In this case, the proposed resolutions of the second and third respondents, that were made in flagrant breach of the agreement, constituted a threatened act or resolution by the first respondent that unfairly discriminated against or was prejudicial to the appellant as squarely provided in s. 346(1)(b) of the Act. The appellant had been discriminated and/or prejudiced and this resulted in actionable oppression. (paras 103, 113 & 128)

(2) Due to the impasse in settling the SA, the second respondent, at the request of the third respondent, by way of the resolutions, requisitioned for six directors to be appointed to the first respondent's Board of Directors in an attempt, *albeit* unsuccessful, to force the appellant to execute the SA on terms favourable to the third respondent/TAEL Two Partners Limited ('TTPL'), inconsistent with the agreement. The central grievance of the appellant, that he had been discriminated or unfairly prejudiced here, was the move by the third respondent/TTPL using majority shareholding power to displace him of management control of the first respondent. The hour had come for the third respondent/TTPL to exit from its investment in the first respondent. But this move had been accordingly conceived and calculated to maximise the third respondent/TTPL's exit profitability by way of a trade sale of its shares in the first respondent to third party buyers, free of management control by the appellant. The appellant, as the founder of the first respondent, had built up its business using his brain and brawn. The fruits of his efforts substantially resided in the trade secrets and intellectual property rights of the pharmaceutical and healthcare products marketed by the first respondent as well as in the confidential corporate financial information of the first respondent. These have been safeguarded by him having tight management control and being personally involved in the management affairs of the first respondent at all times. (paras 107-109)

(3) TTPL, which principally was in the corporate finance and investment business, must have researched and discovered that it was profitable to joint venture with the appellant to delist and acquire substantial equity in the first respondent with the plan to further expand the first respondent's business but, thereafter, exited by selling off its equity investment in the first respondent. Consequently, the entry of TTPL/third respondent into the joint venture was plainly subject to the agreement that the appellant shall maintain management control of the first respondent; otherwise, the first respondent would never have been delisted and the third respondent/TTPL becoming the majority shareholder. The appellant settled on the joint venture in good faith with openness that he would not relinquish management control of the first respondent. (paras 110 & 111)

(4) The agreement and r. 35 of the first respondent's constitution resonated with the second and/or third elements of the equitable considerations in *Ebrahimi*. The third respondent/TTPL was a corporate opportunist. The third respondent had admitted that its 'priority was to exit soonest possible at the highest price'. However, the second and third respondents, in their defence, only focused on the time slice from 2019 to 2022 in isolation. By the third respondent's move, it was obvious that the third respondent/TTPL was determined to profit themselves regardless of the detriment to the appellant when they exited from the

first respondent. Furthermore, the appellant will thereafter be then left only as a minority shareholder without management control to shoulder the immense difficulty disposing his own shareholding in the first respondent. The resolutions, which were tabled to facilitate the third respondent/TTPL's exit, disregarded fair play and were hence oppressive. The appeal was allowed. Judgment was entered in favour of the appellant and the order of the High Court was set aside. (paras 115, 117, 129, 131 & 132)

Case(s) referred to:

Auspicious Journey Sdn Bhd v. Ebony Ritz Sdn Bhd & Ors [2021] 4 CLJ 721 FC ***(refd)***

Auspicious Journey Sdn Bhd v. Ebony Ritz Bhd & Ors And Another Appeal [2018] CLJU 1392; [2018] 1 LNS 1392 CA ***(refd)***

Dato' Low Mong Hua v. Banting Hock Hin Estate Co Sdn Bhd & Ors [2003] CLJU 387; [2003] 1 LNS 387 HC ***(refd)***

Ebrahimi v. Westbourne Galleries Ltd & Ors [1973] AC 360 ***(refd)***

Genisys Intergrated Engineers Pte Ltd v. UEM Genisys Sdn Bhd & Ors [2008] 6 MLJ 237 CA ***(refd)***

Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2019] 7 CLJ 143 CA ***(refd)***

K-ZAQ(M) Sdn Bhd v. Johnson Matthey Public Ltd & Ors [2013] CLJU 1515; [2013] 1 LNS 1515 CA ***(refd)***

Lim Kah Keng v. Teng Taim Sing & Ors [2021] MLJU 1903 ***(refd)***

Mega Education Systems Sdn Bhd v. Ozone Glass Design Sdn Bhd & Ors [2011] CLJU 1927; [2011] 1 LNS 1927 HC ***(refd)***

Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor [2010] 6 CLJ 721 FC ***(refd)***

Perak Integrated Networks Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor [2018] 5 CLJ 513 FC ***(refd)***

PP v. Chong Ah Keong & Anor [2023] CLJU 241; [2023] 1 LNS 241 HC ***(refd)***

Re A Company (No 00709 of 1992) O'Neill & Anor v. Phillips & Ors [1999] 2 All ER 961 ***(refd)***

Re Westshield Ltd v. Waldron & Ors And Waldron & Another [2019] EWHC 115 ***(refd)***

Tien Ik Enterprise Sdn Bhd & Ors v. Woodsville Sdn Bhd [1995] CLJU 99; [1995] 1 LNS 99 SC ***(refd)***

Tuan Haji Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Legislation referred to:

Companies Act 1965 (repealed), s. 181(1)

Companies Act 2016, ss. 128(1), 181(1)(a), (b), 311, 346(1)(a), (b), (2)

For the appellant - Kelvin Seet Wan Nam & Nigel William Kraal; M/s Cheang & Ariff

For the 1st respondent - James Khong Yoon; M/s James Khong

For the 2nd respondent - Wan Yee Herng & Nicole; M/s Shook Lin & Bok

For the 3rd respondent - Lee Shih, Sia Sew Mun, Alvin Oh, Wong Chee Chien & Sew Chang Peng; M/s Lim Chee Wee Partnership

[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No: WA-24NCC-976-10-2022 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Choo Kah Sing JCA (Majority):

Introduction

[1] The appellant sought for an order from the High Court to, *inter alia*, declare that the third respondent has conducted itself in a manner that unfairly discriminates against or otherwise prejudices the appellant. The appellant's complaint was mounted on s. 346(1)(b) of the Companies Act 2016 (hereafter 'CA 2016'). Hence, the appellant also sought an order from the High Court to bring an end or to remedy the matter complained.

[2] On 26 January 2023, the High Court refused to grant an order as prayed for in the appellant's originating summons dated 28 October 2022. Dissatisfied with the decision of the High Court, the appellant appealed to the Court of Appeal.

[3] On 16 April 2024, this court, after having read the written submissions and after having heard the oral submissions of the parties' respective counsels, reserved its decision. The panel members of this court, after having deliberated the issues, came to a split decision. This is the majority decision, and the reasons are set out as below.

Salient Facts

[4] The salient facts leading to the filing of the oppression action by the appellant are condensed and set out as below.

[5] The appellant and third respondent are both the major shareholders of the first respondent company. The appellant holds 33.99% and the third respondent holds a beneficial interest in 63.45% of the shareholding in the first respondent company. The second respondent is the beneficial share custodian of the 63.45% shares in the 1st respondent company for the third respondent.

[6] Sometime between August 2022 and October 2022, there was a fallout between the appellant and the third respondent. The fallout was in relation to a protracted disagreement over the finalisation of the terms of a shareholders agreement (hereafter "SHA") in relation to the respective parties' interests in the first respondent company.

[7] The appellant and the third respondent were supposed to enter into a SHA in 2017. However, the parties could not come to terms of a final SHA. The parties had exchanged 33 drafts of the SHA, but still could not agree. The appellant and the third defendant were locked in stalemate over the SHA. It is important to appreciate the fact that the parties have taken five years to negotiate the terms of the SHA. The parties' interests in the first respondent company have taken the toll after the prolonged negotiation.

[8] It is instructive to understand how the parties became the major shareholders in the first respondent company. In brief, the appellant was the founder of the first respondent company and had successfully taken the first respondent company public by listing it on the Main Board of Bursa Malaysia. The appellant was the single largest shareholder of the then listed company.

[9] Sometime in October 2017, the appellant met a private investment group known as TAEL Group (hereafter 'TAEL'). The appellant and TAEL were on the same page to bring the then public listed company private, *ie*, to delist the then listed company.

[10] It was the understanding between the appellant and TAEL that TAEL would finance and fund the purchase of the public shares of the then listed company in order to realise the aim of bringing the company private. Negotiation and planning to this end began in October 2017.

[11] On 12 October 2017, the appellant and TAEL entered into an agreement known as "agreement on voluntary general offer" (hereafter "VGO1") as part of the privatisation exercise. The third respondent was incorporated and used as a special vehicle for TAEL to represent its interest in the delisting exercise and its investment in the first respondent company. On 13 September 2018, the appellant and TAEL signed a second VGO (hereafter "VGO2") which had the effect of amending and restating VGO1 in its entirety. One of the terms in the VGO2, which is relevant to the appellant's application, is that each party shall be entitled to nominate two directors to the Board of the first respondent company (and two other companies).

[12] There are 25 key reserved issues set down in the VGO2 in relation to the management, dealings, and powers of the affairs of the first respondent company (and two other companies). It was the understanding of the parties that any action taken by any party that is not in accordance with any of the 25 key reserved issues shall be a breach of the VGO2. It is also stated that "a resolution to transact any of the key reserved issues shall be valid only if passed by the affirmative vote and approval of David and TAEL, being the parties." One of the key reserved issues which is relevant here is item 18 which reads as follows:

> Any alteration to the Companies' Board composition and the maximum number of directors on the Board of the Companies and terms on tenure, eligibility and qualification of a director of any of the Companies.

[13] It is an important to note that from the beginning TAEL had made known to the appellant that its investment interest in the first respondent company was only for a period of a five-year term. After the fifth year, TAEL would exit from the investment. TAEL's five-year term investment

plan in the first respondent company had ended. Although there is a dispute over whether the five-year term ended in April 2023 or April 2024, that dispute has become academic because both dates have lapsed.

[14] After the five-year term ended, TAEL wanted to exit the investment, but it could not. The appellant refused to let TAEL exit because the parties did not execute the SHA. TAEL had no choice but to, through the second respondent as the named shareholder, issue a requisition notice dated 21 October 2022 (hereafter "the requisition notice") calling the existing directors to convene an EGM for the appointment of six more directors on the Board of the first respondent company. By having six more directors on the Board, the second respondent would be able to pass resolution(s) to the effect of paving the way for a trade sale of the third respondent's beneficial shares in the first respondent company.

[15] The second respondent, being a member of the first respondent company, was entitled to exercise its right under s. 311 of the CA 2016 to issue the requisition notice. However, the appellant felt that the conduct of issuing the requisition notice and the proposed resolution if passed would have a cumulative oppressive effect against him (hereafter "the oppressive conduct"). The thrust of the appellant's case is that in the event the resolution is successfully passed to appoint six more directors on to the Board of the first respondent company, this would in effect be in breach of an "equitable bargain" between the parties (the appellant and TAEL) in the VGO2.

[16] The appellant, therefore, sought for an order of the court for, *inter alia*, the following reliefs:

(i) a declaration that the third respondent had conducted itself in a manner that unfairly discriminated or otherwise prejudiced to the appellant and/or in regard of the interests of the plaintiff;

(ii) a declaration that the requisition notice is unlawful as the proposed resolution unfairly discriminates and/or is otherwise prejudicial to the plaintiff; and

(iii) an order that the third respondent shall sell its beneficial shares in the first respondent company to the appellant at a value to be determined by an independent valuer to be appointed by the court as proposed by the appellant to determine the purchase price; and *etc*..

[17] The appellant's main intention is to seek a court order to order the third respondent to sell its beneficial shares in the first respondent company to the appellant. In other words, the plaintiff is seeking an order for a minority buy out as the remedy to resolve the impasse.

[18] The question now is whether the alleged oppressive conduct tantamounts to an oppression against the appellant within the envisaged meaning of s. 346(1)(b) of the CA 2016, *vis-à-vis* the oppressive conduct unfairly discriminate against or is otherwise prejudicial to the appellant.

A **The Decision Of The High Court**

[19] The appellant averred the third respondent had broken one of the equitable bargains which was that each party was entitled to nominate two directors to the Board of the first respondent company. Therefore, the appellant had a legitimate expectation that the third respondent would not
B appoint more than two directors to the board of the first respondent company although the third respondent holds a majority shareholding in the first respondent company.

[20] The appellant further averred that the third respondent could not rely
C on the majority rule for its own gain. The appellant had a legitimate expectation based on the equitable bargain that the composition of the board would not change despite the fact that the third respondent holds the majority shares. If there is a change, consent of the appellant must be obtained. If the majority rule was availed to the third respondent, the appellant would be
D oppressed.

[21] The learned High Court Judge was confronted with two questions. First, whether there was an equitable bargain between the parties in the first place? Second, if there was an equitable bargain, would the appellant be entitled to rely on legitimate expectation to uphold that bargain?

E **[22]** The learned High Court Judge, while addressing the first question, relied on the House of Lords decision in *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360 to determine the circumstances in which equitable considerations may exist. The learned High Court Judge cited a relevant passage (at p. 379) from the judgment of Lord Wilberforce which stated as
F follows:

> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one,
G of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a
H pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

I **[23]** The learned High Court Judge found the shareholders (in the first respondent company) were unlikely to have expectations beyond the strict legal rights as provided in documents and laws that govern the relationship

between them. This was because the first respondent company is a large one, not a small one. The intention of TAEL or the third respondent was clearly profit-oriented. TAEL or third respondent was not there in the business for long-term investment. Therefore, it could hardly be inferred from the facts that there was any existence of personal relationship based on mutual confidence between the parties. Obviously, this was not a case of a quasi-partnership. Therefore, the learned High Court Judge concluded that there could not be any equitable bargain which could give rise to any legitimate expectation nor was there a breach of such an equitable bargain. At the end, the learned High Court Judge answered both the questions in the negative.

[24] The learned High Court Judge found that the oppressive conduct complained of, which was premised on a breach of equitable bargain could not be made out. What was left, if any, would be a breach of the VGO2. The learned Judge of the High Court concluded that the breach itself would not suffice to form the basis for an oppression action under s. 346(1)(b) of the CA 2016.

Before The Court Of Appeal

The Law

[25] The cardinal rule is that the company's constitution or any collateral agreement entered into between the shareholders shall be the legal terms that govern the relationship of the shareholders, including the internal affairs and participation in the management of the company. Therefore, the court must uphold those legal terms of the shareholders by embracing and giving effect to the majority rule principle under company law. Section 346 of the CA 2016 is a statutory exception to the general rule – an oppression to a minority shareholder.

[26] There are two limbs in the application for remedy in cases of an oppression. The first limb is in s. 346(1)(a) of the CA 2016 which states as follows:

> that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company.

[27] The second limb is in s. 346(1)(b) of the CA 2016 which states as follows:

> that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

[28] The distinction between the two limbs is that the first limb deals with the manner in which the affairs of the company are being conducted or the manner in which the powers of the directors are being exercised, whereas the second limb deals with some act of the company or a resolution or proposed resolution of the company.

[29] In *Pan-Pacific Construction Holdings Sdn Bhd v. Ngiu-Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721, 735, FC, the apex court has identified four categories of conduct which permits a judicial remedy under s. 181 of the Companies Act 1965 (now s. 346 of the CA 2016):

> [26] In other words s. 181 permits judicial remedy on four categories of conduct, namely, oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct.

[30] In the present case, the appellant's application relied on the second limb and was premised on the proposed resolution, which it alleges unfairly discriminates against or is otherwise prejudicial to the applicant. The burden is on the appellant to satisfy the court on the balance of probabilities that the proposed resolution unfairly discriminates against him or is otherwise prejudicial to him for the purpose of s. 346(1)(b) of the CA 2016.

[31] The test to apply in deciding an application under s. 346 of the CA 2016 is the test of "fairness" in the context of a commercial relationship. The apex court in *Pan-Pacific Construction Holdings Sdn Bhd* (*supra*), at p. 735, stated that the basic theme of the wordings of s. 181 (present s. 346 of CA 2016) is "unfairness". It went on to state as follows:

> [27] … However, unfairness 'does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. "The court … has a very wide discretion, but it does no sit under a palm tree"'. (See: *O'Neil v. Philips* [1999] 2 All ER 961).
>
> [28] In *Re Saul D Harrison & Sons plc* [1995] 1 BCLC it was explained (Hoffmann LJ (as he then was)) that in 'deciding what is fair or unfair for the purposes of s. 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s. 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association … The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the

> board are fiduciary powers, which must be exercised for the benefit of the company as a whole ... But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of s. 459.

[32] In *Auspicious Journey Sdn Bhd v. Ebony Ritz Sdn Bhd & Ors* [2021] 4 CLJ 721, 749, FC, the apex court recognised and acknowledged that the test of commercial fairness/unfairness is equally afforded to the second limb of s. 346 of the CA 2016. The apex court stated as follows:

> [76] In making a finding that oppression has been established, it is important to bear in mind that either limb (a) or limb (b) or both limbs may well be satisfied under s. 181 CA 1965. Often limb (b) is simply not examined or considered, although it equally affords basis for the legal test under s. 181 of 'commercial fairness/unfairness' as expounded in the decisions of this court in *Pan Pacific Construction Holdings Sdn Bhd* ….

Equitable Considerations

[33] If an applicant wishes the court to consider equitable considerations, then the burden lies with the applicant to show there existed a relationship in the nature of a quasi-partnership beyond an association which is purely a commercial one.

[34] In order to determine whether there is a relationship in the nature of a quasi-partnership, the court should consider the circumstances of the commercial relationship between the shareholders, including but not limited to whether there exists one or more of the three elements as propounded in *Ebrahimi* (*supra*), at p. 379E-G, namely:

> (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company;
>
> (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business;
>
> (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

[35] By no means are the above elements (hereafter "the *Ebrahimi* elements) exhaustive, as Lord Wilberforce said that "it would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise."

[36] The court, after having satisfied itself that the association is in the nature of a quasi-partnership, is entitled to take into account equitable considerations, and should not limit itself to the strict legal rules or contractual arrangement which gives rise to the rights of the members, including the applicant/petitioner.

[37] In the event that the relationship between the shareholders is in the nature of quasi-partnership, then there is an added factor which members are obliged in law to observe, namely, to act in good faith to one another as per *Pan-Pacific Construction Holdings Sdn Bhd* (*supra*), at p. 736.

[38] This legal proposition is in tandem with Lord Hoffmann's observation in *Re A Company (No 00709 of 1992) O'Neill & Anor v. Phillips & Ors* [1999] 2 All ER 961, 967c, wherein His Lordship stated as follows:

> In the case of s 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. *Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.*
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. *But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.* (emphasis added)

[39] Lord Hoffmann was referring to a commercial relationship in the nature of a quasi-partnership where equitable considerations make it unfair for those conducting the company's affairs to strictly rely on legal powers (legal rules).

[40] In summary, the legal test is commercial fairness. Fairness must be applied judicially and be based on rational principles and be used in the context of the commercial relationship. The commercial relationship is normally found in collateral agreement, legal rules or company documents, such as the articles of association. Upholding the promises in the collateral agreement, legal rules and articles of association are the most important elements of commercial fairness. Therefore, fairness must always be measured in the context of the commercial relationship of the parties who are in dispute, and the conduct complained of must be an affront to commercial fairness. If the alleged breach is premised on equitable considerations, then it is necessary for the applicant to first establish that the commercial relationship is one in the nature of quasi-partnership in which equity requires members to act in good faith toward each other.

The Majority Analysis And Findings

[41] As stated earlier, the burden is on the appellant to satisfy the court that the proposed resolution would unfairly discriminate or would be otherwise prejudicial to him. "Discriminate" means being treated differently or less favourably from another person for some reason. "Prejudice" means something which is detrimental or harmful to him. It would seem the appellant's complaint is more fitted to "otherwise prejudicial to" him, instead of "unfairly discriminates against" him. The proposed resolution by itself could not be said in any manner to unfairly discriminate against the appellant, but rather the effect of the resolution would be detrimental or harmful to him in the sense that the appellant claimed, namely that the third respondent would be in breach of the equitable bargain.

Equitable Bargain

[42] The appellant mounted its case on the existence of an equitable bargain, and that equitable bargain has been broken by the third respondent/TAEL. As explained above, if the commercial relationship between the shareholders is not in the nature of quasi-partnership, the strict legal rules of their association would apply, unless the conduct of the majority is an affront to commercial fairness. It is only if the commercial relationship between the shareholders is one in the nature of quasi-partnership would the court be permitted to take into account equitable considerations.

[43] The appellant's application was premised on the existence of commercial relationship in the nature of quasi-partnership. The appellant's counsel submitted that the appellant had fulfilled all the three *Ebrahimi* elements. Learned counsel submitted that first, prior dealing on mutual trust arose when parties embarked on the delisting or privatisation exercise, and this took the form of, *inter alia*, the VGO1 and VGO2 and offer document. Secondly, the understanding between the parties of having 2:2 board representation requirement is found in the VGOs, and the third respondent had also stated that it had no intention to prevent the appellant from running the business. Lastly, r. 35 of the company's constitution requires any transfer of shares to be approved by the board, whose decision shall be final and conclusive. The appellant even had the right of first refusal to purchase the third respondent's shares.

[44] The first element in *Ebrahimi* (*supra*) is that "an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company". The majority of this court finds the facts in the present case could hardly come near to the circumstances for the first element. The relationship between the parties is purely a commercial relationship. The parties, the appellant and TAEL, met

A sometime in 2017, and they in principle came to terms to delist the first respondent company. VGO1 was signed on 12 October 2017 to set down the principal terms. A year later, VGO2 was signed on 13 September 2018 which amended and restated the entire VGO1. Later, the parties could not come to terms of the proposed SHA since the inception of VGO1 until the
B present time. All these facts could infer that there was no personal relationship involving mutual confidence between the shareholders. Further, this is obviously not a case of a previous partnership turned into a limited company. Therefore, the majority of this court finds that the commercial relationship between the shareholders was not in the nature of a personal
C relationship involving mutual confidence.

[45] The second *Ebrahimi* element is there exists "an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business." The VGO2 is the agreement as well as the understanding of the parties. However, that
D agreement is not in reference to participation in the conduct of the business of the company. It merely sets down the broad mechanism for the way forward and the structure of the shareholding and numbers of Board members. It does not deal with the conduct of the business of the company. The 25 key reserved issues are a mixture of the powers and dealings and
E internal management of the company. What is material is the appellant was in control of the management of the first respondent company before TAEL came into the picture and continued to be in control after that; the appellant never lost control of the management of the first respondent company. The third respondent, although it is the majority shareholder, did not participate in the conduct of the business. The VGO2 by itself is not an agreement or
F understanding in relation to the participation of the shareholders in the conduct of the business. The third respondent was not interested in participating in the conduct of the business. The third respondent regarded its investment as a short-term investment, *ie*, a five-year term investment. Therefore, the majority of this court finds that the appellant had failed to
G establish there was an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business of the company.

[46] The third *Ebrahimi* element, a "restriction upon transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go
H elsewhere." The restriction here is one where members are not allowed to walk out of the association, and the restriction remains binding even if there is a fall out for reasons as mentioned – confidence in the association is lost or a member is removed from management. This element postulates that the members came together with a mutual understanding that the association
I shall remain and that no member could leave even if that member falls out with the rest.

[47] The constitution of the first respondent company r. 35 states as follows:

> The Board may decline to register any transfer of shares to a person of whom they do not approve and may also decline to register any transfer of shares on which the Company has a lien. The decision of the Board shall be final and conclusive.

[48] There is no restriction to prohibit members from walking out of the company. Rule 35 merely states the board may decline to register a transfer of shares to a person who they do not approve. There is no restriction in the sense that a member cannot sell, rather, r. 35 gives the discretionary power to the board to approve or decline to register a transfer of shares to a person who will become a member. Therefore, the majority of this court is of the view that r. 35 does not satisfy the third *Ebrahimi* element.

[49] The majority of this court finds that the appellant has failed to establish a relationship in the nature of quasi-partnership on all three counts relied on by the appellant. Therefore, the appellant could not move the majority of this court to take equitable considerations into account.

Loss Of Mutual Trust And Confidence (An Equitable Consideration)

[50] The appellant's counsel urged the court to find there was a loss of mutual trust and confidence when the third respondent breached the equitable bargain. In the first place, was there a relationship of mutual trust and confidence between the parties? The appellant's counsel submitted that the fact that the appellant gave up his majority stake in the listed company in reliance of the promise made by the third respondent/TAEL sufficed to show there was a relationship of mutual trust and confidence.

[51] A relationship of mutual trust and confidence must be built upon the test of time, not by mere agreement to engage to do something together. The VGO1 and VGO2 were merely agreements to set down the broad mechanism for the way forward and the structure of the shareholding between the appellant and TAEL. The nature of the VGOs was purely commercial in nature for the parties to come to terms in an investment plan. The VGOs do not establish a relationship of mutual trust and confidence as alleged by the appellant.

[52] A relationship of mutual trust and confidence could be inferred, although not necessarily always the case, from the existence of a relationship of a partnership before a company is incorporated. The parties must show there is some past relationship in the sharing of responsibility and profit of the business before formation of a limited company, just like the facts in *Ebrahimi* (*supra*).

[53] With regard to the submission that the appellant gave up his majority stake of the listed company in reliance of the promise made by the third respondent/TAEL, therefore, a relationship of mutual trust and confidence

was established, the majority of this court is of the view that the appellant should have known that once the company became delisted and went private, he would no longer hold a majority stake and that the third respondent would be the majority shareholder. The appellant, being an astute businessman, must have considered this calculated risk. The appellant got what he actually wanted, *vis-à-vis,* to bring the public listed company private and to have greater control of the management and finance of the first respondent company, as a result of TAEL's investment.

[54] In actual fact, the appellant never lost control of the management of the 1st respondent company. The appellant was, and still is, the prime mover of the business of the first respondent company. The appellant continued managing the affairs of the business after TAEL's involvement. Although on the face it may look as if the appellant had given up his majority stake, the truth is the appellant actually gained from the association with TAEL.

[55] The majority of this court is not convinced that the parties had premised their relationship on mutual trust and confidence; the "marriage" was rather a business opportunity for both sides to proceed with a win-win endeavor to delist the first respondent company.

Legitimate Expectation

[56] The appellant's counsel submitted that there was a legitimate expectation that the third respondent or TAEL would adhere to the agreement of the VGO2 in that the parties' representatives to the board would be in the ratio of 2:2. The proposed resolution, if passed, would go contrary to that legitimate expectation.

[57] It must be noted that legitimate expectation is not a cause for an application under s. 346 of the CA 2016, but rather a consequence of an equitable restraint in a case where equitable consideration apply. This was made clear in the judgment of Lord Hoffmann in *O'Neill v. Phillips* (*supra*), wherein His Lordship stated, at p. 970g, as follows:

> It was probably a mistake to use this term, as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was 'correlative' to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application. That is what seems to have happened in this case.

[58] On that score, the submission of legitimate expectation by the appellant's counsel could not be a cause to establish there was unfairness to the appellant in his application under s. 346(1)(b) of the CA 2016.

The Proposed Resolution

[59] The proposed resolution was in fact consistent with the third respondent's bargain in the VGO2 *vis-à-vis* exiting after five years as planned. The appellant was, at all times, aware that the third respondent or TAEL would end the business-venture after the five-year term ended. That was the expectation the appellant should have prepared himself for after the end of the five-year term. The proposed resolution could not be regarded as being unfair to the appellant in commercial terms as the intention of the third respondent (to exit from the investment after five years) was made known to the appellant from day one.

[60] The appellant was, at all material times, in control of the first respondent company. The appellant did not complain that the third respondent had interfered into the management of the company, nor did he make any complaint that there was a threat to remove his power in running and managing the daily affairs of the first respondent company. In fact, the third respondent did not nominate two directors to the Board although it was entitled to do so from 2019 to 2022. This postulates that the third respondent was there not to interfere with or to take control of the first respondent company. The third respondent explained that the purpose for the proposed resolution was to pave the way for its exit from the first respondent company as per its investment plan. As such, the proposed resolution was not to unfairly discriminate or to otherwise prejudice the interest of the appellant. There was no commercial unfairness in the proposed resolution.

[61] The appellant's complaint of the breach of the equitable bargain was based on the provision in the VGO2 for the nomination of two directors each from the appellant and TAEL. This "equitable bargain" was the cornerstone of the appellant's petition. However, it was the appellant himself who had amended the rules of the constitution of the first respondent company to provide that "the number of directors shall not be less than two nor more than ten" in 2019. This shows that appellant himself did not regard the 2:2 ratio for Board members to be a restriction that must be complied with at all times.

[62] The majority of this court is of the view that the appellant's main objective in filing the s. 346 application was to obtain an order that would have the effect of enforcing the terms of the SHA that the appellant wanted and which the third respondent rejected. The appellant could not pressure the third respondent to sell its majority shares to the appellant in accordance with his terms in the absence of a SHA that has been agreed by the parties. The court should not be used as a means to an end, *vis-à-vis,* to obtain a court order for a bargain that the appellant failed to reach. The stalemate between the parties was purely a commercial dispute which ought to be settled within the four corners of the commercial documents.

A *Summary*

[63] The majority of this court finds the appellant could not establish the association was in the nature of quasi-partnership. The appellant did not fulfill any one of the three *Ebrahimi* elements. Therefore, there is no basis for this court to take into account equitable considerations and to impose
B equitable restraint on the third respondent.

[64] The majority of this court also finds the bargain, *ie*, the VGOs, is purely a commercial bargain. There was purely a commercial agreement entered into between the appellant and TAEL or the third respondent; there was no equitable bargain as claimed by the appellant. The breach of the
C VGO2, if any, is purely a contractual one. This is not enough to constitute a cause of complaint under s. 346 of the CA 2016.

[65] The proposed resolution in fact supports the parties' bargain, *vis-a-vis,* the third respondent's/TAEL's term of investment has ended, and therefore
D the third respondent is ready to withdraw itself from the investment. As mentioned in the beginning, the parties' interests have taken a toll because the SHA has taken too long to be finalised, and still has not finalised. The interest and position of the third respondent/TAEL today are no longer the same as in 2017.

E **[66]** The issuance of the requisition notice calling the existing directors to convene an EGM for the appointment of six more directors to the board of the first respondent company was an exercise of a statutory right pursuant to s. 311 of the CA 2016. The exercise of the statutory right and the proposed resolution could not be considered as unfair in the context of a commercial
F relationship between the parties. The appellant should have anticipated the departure of the third respondent after the end of the five-year term. Holding on to the initial bargain, *ie*, the 2:2 ratio of Board members, as the basis of this application seems to be contrary to the agreement and understanding that TAEL/third respondent would exit from the investment after the fifth year.

G **[67]** By filing the s. 346 application, the appellant's end game was to obtain a minority buy-out order. The appellant had failed to secure the terms he wanted in a SHA, therefore, the appellant came to the court to ask the court to give effect to the terms he had failed to secure, such as, among others, the right of first refusal. This court will not accede to the appellant's request as
H the appellant has failed to satisfy the majority of this court that he was oppressed within the meaning of s. 346(1)(b) of the CA 2016. The appellant's complaint does not in any way come within the ambit of commercial unfairness.

[68] As for the events after the decision of the High Court, the majority of
I this Court finds they should not be considered as they were not part of the High Court action. The court should only be concerned with the facts that were before the High Court.

[69] The majority of this court finds the appellant has failed to show that the proposed resolution would unfairly discriminate against or be otherwise prejudicial to the appellant. Therefore, the majority of this court finds this is not a fit and proper case to grant any remedy within s. 346(2) of the CA 2016.

Conclusion

[70] For the reasons as stated above, the appeal is therefore dismissed with costs. The appellant shall pay costs of RM3,000 (subject to allocatur fees) to the second respondent and costs of RM60,000 (subject to allocatur fees) to the third respondent.

Lim Chong Fong JCA (Dissenting):

Introduction

[71] This is an appeal arising from an oppression action initiated by a shareholder of a public company.

[72] The appellant who is the plaintiff in the High Court is an individual and a shareholder of the first respondent company.

[73] The first respondent which is the first defendant in the High Court is a Malaysian incorporated public company involved in the business of manufacturing and trading pharmaceutical and health care products.

[74] The second respondent which is the second defendant in the High Court is also a Malaysian private company and another shareholder of the first respondent company that nominally holds the shares in trust for the third respondent.

[75] The third respondent which is the third defendant is a Malaysian private company and a wholly owned subsidiary company of Cayman Islands incorporated Astoria Ltd ("AL"). AL is a wholly owned subsidiary of also Cayman Islands Incorporated TAEL Pantaleon Investments Ltd ("TPIL"). TPIL is ultimately a subsidiary of TAEL Two Partners Limited ("TTPL"), a private equity firm in the TAEL group of companies.

[76] At the material time of the initiation of the High Court action, the appellant owns 33.99% shares in the first respondent whereas the third respondent beneficially owns 63.45% shares in the first respondent registered in the name of the second respondent. There are other shareholders who own 2.56% of the first respondent but are not involved in the High Court action.

[77] We heard the appeal on 16 April 2024 and thereafter adjourned our decision to deliberate on the submissions put forth by the parties.

[78] Upon our deliberation, it became clear that Justice Ravinthran Paramaguru JCA and Justice Dr Choo Kah Sing JCA are in the majority and minded to dismiss the appeal. I am, however, minded to allow the appeal and hence furnish my minority judgment below to elucidate my reasons.

A **Background**

[79] The first respondent, then a private company known as Ho Yan Hor (Kausing Brand) Medical Hall Sdn Bhd was founded and managed by the appellant in 1980.

B **[80]** By reason of business expansion and the resultant need for capital injection, the first respondent was re-named Hovid and converted to a public company and listed on the second board of the Kuala Lumpur Stock Exchange in 2005. It was transferred to the main board listing in 2006. The first respondent, nonetheless, continued under the management control of the appellant as the chairman and managing director.

C

[81] Sometime between 2014 to 2015, the appellant and TTPL entered into negotiations to delist the first respondent. At the time, the appellant owned 33.72% shares in the first respondent company; hence, TTPL was required to obtain the agreement of the appellant to delist the first respondent pursuant to the Bursa Malaysia main market listing requirement because the appellant held in excess of 25% of the company shares.

D

[82] Consequently, with the agreement of the appellant to delist, the appellant and TTPL embarked on a joint venture whereby TTPL (through its special purpose vehicle, the third respondent) would offer to purchase the necessary shares from the general public to delist the first respondent. According to TTPL, its interest in the first respondent is in the form of investment with the view of maximising its returns by its exit plan period, to wit, after five years.

E

[83] The terms of the aforesaid joint venture are found in three written agreements namely:

F

(i) voluntary general offer agreement no. 1 dated 12 October 2017 ("VGO1");

(ii) voluntary general offer agreement no. 2 dated 13 September 2018 ("VGO2"); and

G

(iii) offer document dated 5 October 2019 ("OD") which has been approved by the Securities Commission and complied with the regulatory framework of the Capital markets and Services Act 2007 and Main Market Listing Requirements of Bursa Malaysia.

H

[84] In both VGO1 and VGO2, the purpose has been stated as follows:

> The Parties are undertaking a conditional Voluntary General Offer ("Offer") of all the remaining ordinary shares ("Offer Shares") and remaining outstanding warrants (2013/2018) ("Offer Warrants") in Hovid Berhad (Company No. 58476-A) ("Hovid" or the "Company"). A special purpose vehicle, Fajar Astoria Sdn. Bhd. (Company No. 1249937-D) ("FASB"), has been incorporated for this purpose. FASB and David as Joint Offerors (pursuant to the definition under the Malaysian Code on

I

Take-Over, Mergers and Compulsory Acquisitions, 2016 ("Take-over Code and Rules") shall undertake the Offer subject to the Acceptance Conditions to enable a compulsory acquisition to be undertaken by the Joint Offerors with a view of delisting the Company.

[85] More importantly, it is provided both in VGO1 and VGO2 as follows on board representation:

Each party shall be entitled to nominate two directors each to the Board of Hovid, FASB and Astoria.'

Additionally, Appendix A of both the VGO 1 and VGO 2 sets out 25 key reserved issues that require unanimous approval of the appellant and TTPL.

[86] In the OD, cl. 8 stipulates as follows on board representation:

8.3 Salient Terms of the Agreement

TTPL and David Ho entered into an agreement on 12 October 2017 to regulate their relationship in respect of the Previous Offer and further entered into an amended and restated agreement on 13 September 2018 to regulate their relationship in respect of this Offer following the completion of this Offer whereby the salient terms regulating the relationship between TTPL and David Ho remain unchanged, save for, among others, the new funding for the Offer to be provided by TTPL and the basis of David Ho's transfer of all his shareholding interest to Hovid to FASB as detailed below. The Joint Offerors shall be entitled to nominate 2 directors each on the Board of FASB, TAEL Astoria and the Offeree.

There is also r. 35 of the first respondent's constitution which provides as follows:

35. The Board may decline to register any transfer of shares to a person whom they do not approve and may also decline to register any transfer of shares on which the Company has a lien. The decision of the Board shall be final and conclusive.

[87] Prior to delisting, the first respondent had eight directors with the appellant as chairman and managing director. Upon the delisting of the First respondent on 4 February 2019, six directors resigned on 31 March 2019 but the appellant and his daughter, Michelle Ho remained as directors. Also, the appellant again continued on as chairman and managing director.

[88] Furthermore from 2017 to 2019, there were negotiations on many draft shareholder agreements of the first respondent to be executed between the appellant and Cayman Islands incorporated TAEL Management Co (Cayman) Ltd but nothing came into fruition. In early 2020, the parties were still negotiating on the draft shareholder agreement of the first respondent to be instead executed between the appellant and TTPL. However, there was still impasse on several issues as evidenced by the exchange of emails between them, including the appointment of several of TTPL's representatives into the board of directors of the first respondent and the third respondent exiting the first respondent *via* trade sale.

[89] Subsequently the third respondent as the majority shareholder on 26 September 2022, by relying on the constitution of the first respondent, issued a notice of requisition to the Board to request for an extraordinary general meeting to consider six separation resolutions to appoint six individuals to be directors of the first respondent. This request was repeated on 21 October 2022 with a similar notice of requisition issued instead by the second respondent (collectively "resolutions").

[90] The appellant, in retaliation, on 28 October 2022 initiated a minority oppression action *via* Kuala Lumpur High Court Originating Summons No. WA-24NCC-976-10-2022 ("action") against the respondents premised upon the basis that both the resolutions were contrary to the mutual understanding in the aforesaid agreements.

In The High Court

[91] The appellant in the action sought, amongst others, declaration that the affairs of the first respondent shall be run in accordance with the mutual understanding or agreement between the appellant and the third respondent and that each party shall only be entitled to appoint two directors to the board of directors. Moreover, the appellant sought a minority share buyout order of the shares held by the second respondent.

[92] The learned Judicial Commissioner on 26 January 2023 dismissed the action with costs of RM5,000 to the first and second respondents and RM50,000 to the third respondent respectively ("judgment").

[93] The learned Judicial Commissioner in the grounds of judgment ("GOJ") reported in *PP v. Chong Ah Keong & Anor* [2023] CLJU 241; [2023] 1 LNS 241 held as follows with emphasis added by me:

> C. Considerations and Findings
>
> Action under section 346 of the Companies Act 2016 ("CA")
>
> [19] *As the main ground of the plaintiff's action under section 346(1)(b) of the CA is a breach of an equitable bargain between the plaintiff and the 3rd defendant, it is essential to consider whether this equitable bargain exists.*
>
> [20] The plaintiff's case is that the equitable bargain is evidenced by the VGO Agreements, the Takeover Document and the draft SHAs, the terms of which reflect the requirement for a 2:2 representation in the board of the 1st defendant.
>
> [21] On this issue, *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360 is instructive. The House of Lords acknowledged that there are circumstances in which the rights of shareholders are not necessarily enshrined within the company structure, such as the company's articles of association. In such circumstance, the rights of the parties may be subject to equitable considerations. *Ebrahimi* (*supra*) sets out the circumstances in which equitable considerations may apply:

> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly, the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: *(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence* – this element will often be found where a pre-existing partnership has been converted into a limited company; *(ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company* – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere. (emphasis added)

[22] Since *Ebrahimi* (*supra*), the courts have upheld the existence of equitable bargains, although they may not be expressly set out in the articles of association of a company (see *Allmark v. Burnham and another* [2006] 2 BCLC 437; *Liew Teck Fook v. Chan Yip Pooi & Ors* [2005] 5 CLJ 20; *Lew Siew Moi, Datin v. Ann Loong Holdings Sdn Bhd & Ors* [2010] CLJU 1430; [2010] 1 LNS 1430; [2012] 10 MLJ 734 and *Gue See Sew & Ors v. Heng Tang Hai & Ors* [2020] CLJU 169; [2020] 1 LNS 169; [2020] MLJU 46).

[23] The court notes that the fundamental theme in these cases is the existence of a personal relationship between the shareholders of the companies, based on mutual confidence. This is the first element highlighted in *Ebrahimi* (*supra*), as giving rise to equitable considerations in the relationship between shareholders.

[24] From available documents, the court finds on a balance of probabilities that this personal relationship based on mutual confidence does not exist between the shareholders. This finding was reached by taking a few considerations into account.

[25] *The first is the fact that the 1st defendant is a large company. With such a company, the shareholders are unlikely to have expectations beyond the strict legal rights as provided in documents and laws that govern the relationship between them* (see *Dato' Low Mong Hua v. Banting Hock Hin Estate Co Sdn Bhd & 8 Ors* [2003] CLJU 387; [2003] 1 LNS 387).

[26] *Secondly, the nature of the acquisition of shares in the 1st defendant also negates the existence of a personal relationship based on mutual confidence between shareholders of the 1st defendant. The 3rd defendant had acquired shares in the 1st defendant as part of an investment managed by the TAEL Group, an investment fund/private equity group. This share acquisition exercise was profit-driven and result-oriented, and not a consequence of a personal dealing.*

A [27] *Finally, from the nature of the acquisition of shares in the 1st defendant by the 3rd defendant, it is clear that the relationship between the plaintiff and the 3rd defendant is purely commercial. This is in contrast to cases in which quasi-partnerships were found to have been made out, where the parties generally had prior personal or familial relationships.*

B [28] *With the finding that there is no quasi-partnership between the shareholders of the 1st defendant, it would follow that there can be no equitable bargain giving rise to any legitimate expectation nor a breach of such equitable bargain, that would ensue from the VGO Agreements, the Take-Over Document or the draft SHAs.*

[29] In this regard, the court finds the claim of oppressive conduct, alleged by the plaintiff to have arisen from a breach of the equitable bargain, has
C not been made out.

Other considerations

[30] *It is important to highlight once again that the plaintiff's allegation of oppressive conduct is based on an act having been done or threatened to be done, which unfairly*
D *discriminates against or is otherwise prejudicial to the plaintiff (section 346(1)(b) of the CA).*

[31] *The act in question is the issuance of the Requisitions, which the plaintiff claimed resulted in a breach of an equitable bargain between the plaintiff and the 3rd defendant. The plaintiff claimed that the equitable bargain is set out in the VGO Agreements, the Takeover Document and the draft SHAs.*
E

[32] *With the court's finding that there is no equitable bargain, and following from which there would be no breach of the equitable bargain, what remains of the plaintiff's claim would be a breach of the VGO Agreements or the draft SHAs. Such a claim, in the court's view, cannot form the basis of an action for oppression against* the 3rd defendant, as the VGO Agreements were entered into between
F the plaintiff and TTPL, who is not a shareholder of the 1st defendant. Further, the draft SHAs have not been executed.

D. Decision

[33] With the finding that there is no equitable bargain between the plaintiff and the 3rd defendant giving rise to any legitimate expectation,
G and thus no breach of such equitable bargain, the court finds the plaintiff has not shown that any oppressive conduct was carried out by the defendants.

[34] On this basis, the court dismissed the originating summons, with costs. (emphasis added)

H **[94]** The appellant is dissatisfied with the judgment and has on 26 January 2023 appealed to the Court of Appeal.

My Findings

[95] The appellant sought for relief against the respondents pursuant to
I s. 346 of the Companies Act 2016 ("CA") which provides:

346. Remedies in cases of an oppression

(1) Any member or debenture holder of a company may apply to the Court for an order under this section on the ground:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

(2) If on such application the Court is of the opinion that either of those grounds is established, the Court may make such order as the Court thinks fit with the view to bringing to an end or remedying the matters complained of, and without prejudice to the generality of subsection (1), the order may -

(a) direct or prohibit any act or cancel or vary any transaction or resolution;

(b) regulate the conduct of the affairs of the company in the future;

(c) provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself;

(d) in the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company; or

(e) provide that the company be wound up.

(3) If an order that the company be wound up is made under paragraph (2)(e), the provisions of this Act relating to winding up of a company shall apply as if the order had been made upon a petition duly presented to the Court by the company, with such adaptations as are necessary.

(4) If an order under this section makes any alteration in or addition to any constitution, then, notwithstanding anything in any other provision of this Act, but subject to the order, the company concerned shall not have power without the leave of the Court to make any further alteration in or addition to the constitution inconsistent with the order, but subject to the foregoing provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company.

(5) An office copy of any order made under this section shall be lodged by the applicant with the Registrar within fourteen days from the making of the order.

A (6) The applicant who contravenes subsection (5) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, in the case of a continuing offence, to a further fine of five hundred ringgit for each day during which the offence continues after conviction.

[96] The powers of the High Court conferred by s. 346(1) and (2) of the CA B are discretionary and the function of the appellate court here is that of review only based on the record of appeal. In this regard, Abdul Rahman Sebli JCA (now CJ (Sabah & Sarawak)) held as follows in *Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2019] 7 CLJ 143; [2019] 6 MLRA 219:

[19] As to the proper approach to be taken by the appellate court in C deciding whether to allow or to dismiss an appeal against the exercise of discretion by the lower court, we need only refer to the Federal Court case of *Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor* [1981] 1 MLRA 24; [1981] 2 MLJ 150; [1981] CLJ (Rep) 101 where Abdoolcader J (as he then was) delivering the judgment of the court said at pp. 25-26:

D (b) Review of discretion by an appellate court.

There is a catenation of cases on this point and it will suffice to cull and refer to a few which restate the well-settled principles. An appellate court can review questions of discretion if it is clearly satisfied that the judge was wrong but there is a presumption that E the judge has rightly exercised his discretion and the appellate court must not reverse the judge's decision on a mere "measuring cast" or on a bare balance as the mere idea of discretion involves room for choice and for differences of opinion (*Charles Osenton & Co v. Johnston* [1942] AC 130, 148 (at p 148) per Lord Wright). *The Privy Council in Ratnam v. Cumarasamy & Anor [1964] 1 MLRA* F *599; [1965] 1 MLJ 228 that an appellate court will not interfere with the discretion exercised by a lower court unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice, referring to Evans v. Bartlam [1937] AC 473.*

G The House of Lords, approving the decision of the English Court of Appeal in *Ward v. James* [1966] 1 QB 273, held to the same effect in *Birkett v. James* [1978] AC 297 (at pp 317, 326). *For good measure, we would refer to the felicitous expression of Goulding J in Re Reed (a debtor) [1979] 2 All ER 22, 25 on this point (at p 25)*:

H *... the duties of an appellate court in such matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that* I *are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.*

See also *K-ZAQ(M) Sdn Bhd v. Johnson Matthey Public Ltd & Ors* [2013] CLJU 1515; [2013] 1 LNS 1515; [2014] 1 MLJ 272 (CA). A

[97] The appellant specifically relied on s. 346(1)(b) of the CA here and claimed that the issuance of the resolutions unfairly discriminates against him or is prejudicial to him as a member of the first respondent.

B

[98] These are of course denied by the respondents who relied on the findings of the learned Judicial Commissioner that there was an absence of a personal relationship between the shareholders based on mutual trust and confidence. The third respondent acquired the shares in the first respondent for a commercial purpose. It was hence a profit driven acquisition exercise not amounting to personal dealings. There was no quasi partnership between the appellant and third respondent because the first respondent is a large company and shareholders are unlikely to have expectations beyond the strict legal rights provided by the constitution of the first respondent which governs their relationship. Hence, there is no equitable bargain that gave rise to legitimate expectation for the appellant.

C

D

[99] I noted that s. 346(1) of the CA here is identical with s. 181(1) of the Companies Act 1965.

[100] In *Pan Pacific Construction Holding Sdn Bhd v. Ngiu Kee Corporation (M) Bhd & Anor* [2010] 6 CLJ 721 (FC), Richard Malanjum CJ (Sabah & Sarawak) (later CJ) held as follows with emphasis added by me:

E

> [21] Accordingly the core issue to consider is whether the petitioner is correct in law to assert that in a company which is in the nature of quasi-partnership with its members owing fiduciary duties to one another, breach of such duties would be sufficient to invoke the remedy under s. 181 of the Act.
>
> F
>
> [22] *But in order to better appreciate the core issue it may be appropriate to first examine the principles of law on the application of s. 181 in relation to a company which is not in the nature of quasi-partnership. Meanwhile, it is trite law that in order to succeed in its petition the burden is upon a petitioner on the balance of probability to establish all the elements required to be proven under s. 181.*
>
> G
>
> [23] This court in *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716 briefly reviewed the genesis of judicial intervention in the internal affairs of incorporated companies. It said that 'Traditionally, courts have been reluctant to interfere with matters relating to the internal management of incorporated companies … Two landmark decisions settled the law upon the subject for all time. The first of these was *Foss v. Harbottle* [1843] 67 ER 190; the second was *Mozley v. Alston* [1847] 41 All ER 833 … In time it was accepted that what has come to be known as the rule in *Foss v. Harbottle*.'
>
> H
>
> [24] The judgment went on to say that the effect of such legislative provisions as s. 210 of English Companies Act 1948 (later s. 459 of the UK Companies Act 1985 and presently s. 994 UK Companies Act 2006) which is similar but not in pari materia with s. 181 of the Act which is
>
> I

wider in scope, 'was not to abrogate but to introduce limited exceptions to the rule in *Foss v. Harbottle*'. Thus, it is fair to say that oppression for instance in company law is not a freefloating common law concept but a legislative creature.

[25] *Therefore, in order to succeed in its petition pursuant to s. 181 the petitioner has to establish and 'must eminently be determined according to the facts' of this case that the affairs of the company are being conducted or that the powers of the directors are being exercised in an oppressive manner or in disregard of its interests, or to its prejudice some unfairly discriminatory or prejudicial act of the company has been done or threatened, or that some resolutions of the members, debenture holders or any class of them has been passed or is proposed to be passed.*

[26] In other words s. 181 permits judicial remedy on four categories of conduct, namely, oppressive conduct, conduct in disregard of interests, unfairly discriminatory conduct or prejudicial conduct.

[27] *It may also be noted that from the wordings of s. 181 its basic theme is 'unfairness'. However, unfairness does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. "The court ... has a very wide discretion, but it does no sit under a palm tree".* (See: *O'Neil v. Philips* [1999] 2 All ER 961).

[28] *In Re Saul D Harrison & Sons plc [1995] 1 BCLC it was explained (Hoffmann LJ (as he then was)]) that in 'deciding what is fair or unfair for the purposes of s. 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other.* They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s. 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association ... The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole ... *But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of s. 459'.*

[29] *Thus, in Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] CLJU 170; [1978] 1 LNS 170 the term 'disregard of interests' is to be understood to mean 'unfair disregard' while 'oppression' denotes an 'unfairly prejudicial conduct' which means a conduct 'departing from standards of fair dealing and a violation of conditions of fair play'. But 'a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted'.* And 'trivial or technical infringements of the articles were not intended to give rise to petitions under s. 459'. (See: *Re Saul D Harrison & Sons Plc* (*supra*)).

[30] *The principles of law are therefore quite settled in a non-quasi partnership company.* However, where it is (in the nature of quasipartnership) as in this case there is an added factor which members are obliged in law to observe, namely, to act in good faith to one another

…

[38] *And it is to be noted that O'Neil v. Philips (supra) held inferentially that the principles governing winding-up on the just and equitable basis applied equally in the context of the unfair prejudice remedy.* (emphasis added)

See also *Auspicious Journey Sdn Bhd v. Ebony Ritz Sdn Bhd & Ors And Another Appeal* [2018] CLJU 1392; [2018] 1 LNS 1392 (CA).

[101] It must be noted that the principles governing winding up on just and equitable basis inferentially apply to the unfair prejudice remedy too; hence I further refer to *Tien Ik Enterprise Sdn Bhd & Ors v. Woodsville Sdn Bhd* [1995] CLJU 99; [1995] 1 LNS 99; [1995] 1 MLJ 769 (SC) where Wan Adnan SCJ (later CJ (Malaya)) held as follows with emphasis added by me:

Our s. 218(1)(i) is in *pari materia* with the provisions of s. 222(f) of the English Companies Act 1948. *The application of the 'just and equitable' provision in the section was discussed in the House of Lords case of Ebrahimi v. Westbourne Galleries Ltd & Ors* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289. In that case, Lord Wilberforce said ([1973] AC 360 at p 379; [1972] 2 All ER 492 at pp 499-500; [1972] 2 WLR 1289 at pp 1297-1298):

My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly, the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid

A *down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there* B *may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.*

It is these, and analogous, factors which may bring into play the just and C *equitable clause, and they do so directly, through the force of the words themselves.*

It was the contention of the learned counsel for the appellants before the learned judge that the elements mentioned in the judgment of Lord Wilberforce must be present before a company can be regarded as one which can be imbued with the characteristics of a quasi-partnership D association. The learned judge did not accept it. She said ([1994] 3 MLJ 100 at pp 100-101):

I cannot accept this contention as the judgment does not say that. It merely sets out the circumstances under which the equitable considerations can be adopted and by way of an illustration, the E three elements were stated as examples of circumstances where the just and equitable provision can apply. I emphasize that Ebrahimi's case does not lay down any test when the 'just and equitable' provision can be applied.

Before us the same point was taken. The learned counsel contended that F the learned judge had misunderstood and misapplied the principles in the case. *He said the three elements identified by Lord Wilberforce were the conditions on which the court would be prepared to import equitable considerations to govern the relationship between shareholders and not confine it to be governed solely by the articles of the company. He further submitted that to correctly apply the Ebrahimi rules, the learned judge was obliged to find if one or more of the three elements existed.* G Two Australian cases were referred to us, namely, *Carpenter v. Carpenter Grazing Co Pty Ltd & Ors* [1985] 4 ACLC 18, and *Morgan v. 45 Flers Avenue Pty Ltd* [1986] 10 ACLR 692.

We have carefully studied the cases and with respect say that these two cases do not say that the elements mentioned by Lord Wilberforce must first be present before the H *principles in Ebrahimi's case can be applied, namely to import equitable principles to govern the relationship among the shareholders.* (emphasis added)

[102] Also, in *Genisys Intergrated Engineers Pte Ltd v. UEM Genisys Sdn Bhd & Ors* [2008] 6 MLJ 237 (CA), Gopal Sri Ram JCA (later FCJ) held as follows with emphasis added by me:

I

In arriving at his conclusions of fact a judge hearing a petition under s. 181 of the Act must not consider events in isolation but as part of a consecutive story. In *Re HR Harmer Ltd* [1959] 1 WLR 62 Jenkins LJ approved the following approach adopted by Roxburgh J, the trial judge in that case, when interpreting s. 210 of the UK Companies Act 1948:

> The word 'oppression' is a word in common use and understanding in the English language. But I would just observe in passing that it (s. 210) does not say 'who complains of acts of oppression'; it says 'that the affairs of the company are being conducted in a manner oppressive …' In other words, I think it invites attention, not to events considered in isolation, but to events considered as part of a consecutive story; and it is because I take that view that I have not dealt (and do not propose to deal) with each of the items which I have enumerated one by one.

Annuar J (later CJ (Malaya)) in *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors* [1994] 2 MLJ 789 adopted the same approach and an appeal against his decision to the Supreme Court was dismissed. So too, the Federal Court in *Owen Sim v. Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113 approved of this approach.

[103] Whilst I acknowledge that every case of minority oppression is very much fact-centric, there is however no "straight jacket" solution. That notwithstanding, it is clear to me that there is a vital distinction between an oppression action based on s. 346(1)(a) of the CA where the alleged oppressive act must concern the affairs of the company and that based on s. 346(1)(b) of the CA where the actual or threatened act or resolution of a member must be discriminating or prejudicial to another member who has been aggrieved. These must not be conflated.

[104] Taking cognisance of these trite principles, I noted it is not in dispute that the first respondent started off as a private company under management control of the appellant. The first respondent was converted to a public company and listed on the stock exchange with the appellant still having management control, notwithstanding that the appellant then held only 33.72% of the shares in the first respondent.

[105] Since TTPL was keen to invest in the first respondent as a delisted entity through its nominees, the third respondent and second respondent respectively, I further noted it is not in dispute that the delisting of the first respondent was specifically carried out with clear understanding and agreement of the appellant as also reflected and evidenced in the VGO1, VGO2 and OD, all of which incorporated the requirement that the appellant and TTPL are each entitled to nominate only two directors to the first respondent board of directors ("agreement"). It is thus implicit that there was mutual trust and confidence between the parties and this can also be gathered from the early communications between the parties in 2016 to 2019.

[106] It is also not in dispute that the shareholder agreement between the appellant and the third respondent/TTPL (that ought to have incorporated the aforesaid agreement) has not been executed despite protracted negotiations which took place over several years from 2017 to 2022. Nonetheless, the appellant still remained in control of the first respondent at all material times.

[107] However, due to the impasse in settling the shareholder agreement, I noted the second respondent (at the request of the third respondent following its initial and foiled requisition on 26 September 2022) on 21 October 2022 by way of the resolutions requisitioned for six directors to be appointed to the first respondent's board of directors in an attempt, *albeit* unsuccessful, to force the appellant to execute the shareholder agreement on terms favourable to the third respondent/TTPL inconsistent with the agreement.

[108] The central grievance of the appellant that he has been discriminated or unfairly prejudiced here is the move by the third respondent/TTPL using majority shareholding power to displace the appellant of management control of the first respondent. It is not in dispute that the hour has come for the third respondent/TTPL to exit from its investment in the first respondent. But it is plain to me that this move has been accordingly conceived and calculated to maximise the third respondent/TTPLs' exit profitability by way of trade sale of its shares in the first respondent to third party buyers free of management control by the appellant.

[109] On the special facts of this case, I find it is the appellant as founder of the first respondent who has built up its business using his brain and brawn. The fruits of his efforts substantially reside in the trade secrets and intellectual property rights of the pharmaceutical and health care products marketed by the first respondent as well as in the confidential corporate financial information of the first respondent. These have been safeguarded by him having tight management control and being personally involved in the management affairs of the first respondent at all times.

[110] It is obvious that TTPL, which principally is in the corporate finance and investment business, must have researched and discovered that it is profitable to joint venture with the appellant to delist and acquire substantial equity in the first respondent with the plan to further expand the first respondent's business but thereafter exit by selling off its equity investment in the first respondent.

[111] Consequently, but critically, I find the entry of TTPL/third respondent into the joint venture is plainly subject to the agreement that the appellant shall maintain management control of the first respondent, otherwise the first respondent would never have been delisted and the third respondent/TTPL becoming the majority shareholder. At the risk of repetition, the agreement has been clearly captured in writing in VGO1,

VGO2 and OD. The appellant thus settled on the joint venture in good faith with openness that he would not relinquish management control of the first respondent.

[112] Although there were subsequently altogether 33 draft shareholder agreement exchanged and negotiated between the parties that remained unexecuted due to later mismatch of expectations between them, I find, unless and until the shareholders agreement have been executed and express the contrary, the appellant has management control of the first respondent and continue to have legitimate expectation of management control of the same as spelt out in the agreement *via* VGO1, VGO2 and OD. I also find it did not matter that the appellant had caused the amendment of first respondent's constitution without the reflecting the agreement contrary to that as contended by the second and third respondents. In fact, I find it upright that the appellant did not do so in fairness to the other 2.56% of minority shareholders because the agreement strictly bound the appellant and the third respondent/TTPL only. This is corroborated by the email of Michael Sng of the third respondent dated 2 March 2022 that reads:

> 18. Notwithstanding and in good faith, FASB did not object to the proposed amendments to the Constitution. This was because the investment relationship with David Ho has just begun trusted David to act in the best interest of Hovid.

[113] As a result, I further find the proposed resolutions of the second and third respondents that were made in flagrant breach of the agreement constituted a threatened act or resolution by the first respondent that unfairly discriminates against or is prejudicial to the appellant as squarely provided in s. 346(1)(b) CA.

[114] The celebrated case of *Ebrahimi v. Westbourne Galleries Ltd & Ors* [1973] AC 360 which have been imported *via Tien Ik Enterprise v. Woodsville* (*supra*) and inferentially extended to oppressive actions following *Pan Pacific Construction Holding Sdn Bhd v. Ngiu Kee Corp (M) Bhd & Anor* (*supra*) provides guidelines on equitable considerations which may be introduced to mitigate the rigours of corporate documents, particularly articles of association, often relied by majority shareholders to overrule minority shareholders of the company. However, the guidelines must be judicially applieds subject to the statutory provision in the CA.

[115] In this regard, I find the aforesaid agreement and r. 35 of the first respondent's constitution resonate with the following second limb and/or third limb of the equitable considerations enunciated in *Ebrahimi v. Westbourne Galleries Ltd & Ors* (*supra*) respectively:

> (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business." and

A (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It must not be overlooked it was held in *Ebrahimi v. Westbourne Galleries Ltd & Ors* (*supra*) that equitable consideration may be invoked if one or probably B more of the cited limbs (which are themselves not exhaustive) has been established; see also *Perak Integrated Network Services Sdn Bhd v. Urban Domain Sdn Bhd & Anor* [2018] 5 CLJ 513; [2018] 4 MLJ 1.

[116] I am mindful in *Tuan Haji Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393 the private agreement between the C disputing shareholders was found not to override the articles of association of the company on the removal of directors. However, the facts therein are significantly different from here in that it was an action under s. 181(1)(a) of the CA (now s. 346(1)(a) of the CA) but not s.181(1)(b) of the CA (now s. 346(1)(b) of the CA). Furthermore, the private agreement was found to D bind at best only 30% of the shareholders unlike the agreement here that binds at least 97.44% of the shareholders. Most importantly, it was also found that the private agreement therein ran afoul of s. 128(1) of the CA; thus unenforceable. This case does not therefore assist the second and third respondents who seem to have relied heavily on it.

E **[117]** With the benefit of hindsight acquired from the totality of the consecutive story of the first respondent from 1980 to 2022, it is plain to me that the third respondent/TTPL is a corporate opportunist. The third respondent has admitted that its "priority is to exit soonest possible at the highest price". However, I find that the second and third respondents in their F defense have only focused on the time slice from 2019 to 2022 in isolation. By the third respondent's move here, it is obvious the third respondent/ TTPL are determined to profit themselves regardless of the detriment to the appellant when they exit from the first respondent. Furthermore, the appellant who will thereafter be left only as a minority shareholder without G management control to shoulder the immense difficulty of disposing his own shareholding in the first respondent. The resolutions which are tabled to facilitate the third respondent/TTPLs' exit disregard fair play are hence oppressive.

[118] The third respondent/TTPLs' lack of fair play has been exacerbated H by their unwarranted disclosure of confidential information of the first respondent comprising of corporate cash flow summary to third parties for purposes of their exit trade sale. This has, in my view, been unfairly done in total disregard of the interest of the first respondent and the appellant.

[119] The learned Judicial Commissioner in dismissing the action, with I respect, has however failed to judicially appreciate the appellant's complaint and resultant cause of action here. I observed the learned Judicial Commissioner has in paras. [23], [24], and [26] of the GOJ focussed solely

on personal relationships and mutual trust and confidence between the parties pursuant to the following first limb equitable consideration of *Ebrahimi v. Westbourne Galleries Ltd & Ors* (*supra*):

> (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a preexisting partnership has been converted into a limited company.

The learned Judicial Commissioner made the decisive finding that there is no quasi partnership between the parties here. In the premises, the learned Judicial Commissioner committed a serious misdirection without appreciating and distinguishing that the appellant's case is framed on s. 346(1)(b) CA but not s. 346(1)(a) CA. It is obvious that the first respondent is not a pre-existing partnership which has been converted into a limited company to begin with; thus, this limb is not relevant here. It is also clear in *Pan Pacific Construction Holding Sdn Bhd v. Ngiu Kee Corp (M) Bhd & Anor* (*supra*) that the company concerned need not mandatorily be a quasi-partnership in an oppressive action.

[120] Next in para. [27] of the GOJ, the learned Judicial Commissioner held the relationship between the appellant and third respondent is purely commercial and therefore the agreement could not assist the appellant in his action. However, I find s. 346 CA did not discriminate whether the affairs of the company are commercial or not. In *Ebrahimi v. Westbourne Galleries Ltd & Ors* (*supra*), it has not been held that equitable considerations can never be imported if the affairs of the company or the relationship of the parties are commercial in nature. Otherwise, this would, in my view, be affront to business common sense because companies are mostly incorporated under the Companies Act to engage in commerce. This is consequently a misdirection on the part of the learned Judicial Commissioner.

[121] Additionally, the learned Judicial Commissioner has in para. [25] of the GOJ found that since the first respondent is a large company; hence the shareholders are unlikely to have expectations beyond the strict legal rights as provided in the documents and laws that govern the relationship between them. In other words, the learned Judicial Commissioner concluded that equitable considerations in *Ebrahimi v. Westbourne Galleries Ltd & Ors* (*supra*) are inapplicable here. Again, in *Ebrahimi v. Westbourne Galleries Ltd & Ors* (*supra*), it has not been held that equitable considerations can never be imported if the company concerned is large. There is no limitation on size prescribed in s. 346 CA itself on actionable oppression. This has in fact been rightly conceded by the second and third respondents in their submissions before us: "We acknowledge that equitable considerations or legitimate expectations can be imported, whether the company is large or small". In addition, the case of *Dato' Low Mong Hua v. Banting Hock Hin Estate Co Sdn Bhd & Ors* [2003] CLJU 387; [2003] 1 LNS 387 relied by the learned Judicial Commissioner in support of her findings here are distinguishable because

there was no agreement by the disputing parties therein unlike here where the agreement subsists at all material times. This is thus another serious misdirection committed by the learned Judicial Commissioner.

[122] The importation of equitable principles, in my view, ultimately depends on the facts peculiar to each case and whether it is just and reasonable to do so in the circumstances when unfairness is established following *Pan Pacific Construction Holding Sdn Bhd v. Ngiu Kee Corp (M) Bhd & Anor* (*supra*). A wide discretion is accorded to the court. In this connection, the availability of redress by the aggrieved party against the defaulting party based on breach of contract does not also *ipso facto* preclude the right of that aggrieved party pursuing an oppression action because damages for breach of contract therein may not be an appropriate and/or adequate remedy.

[123] The learned Judicial Commissioner finally went on in paras. [30] to [32] of the GOJ and held that the appellant cannot rely on VGO1, VGO2 and OD to find equitable considerations because these documents were executed by TPPL but not the third respondent as well as there is no shareholders agreement executed by the third respondent.

[124] In respect of the former, I find this is inconsequential because TTPL, third respondent, second respondent and some other related entities of the TAEL group of companies had all participated in respect of or in connection with the affairs of the first respondent with the appellant interchangeably over time at their convenience. They are nominees of the TAEL group of companies (see para. [5] above) and the third respondent therefore cannot ''blow hot and cold'' here to demand exactness and consistency on the entity involved when it now suited them. Moreover, no one amongst them was ever mistaken or misled at all material times. Additionally, I noted that VGO1 and VGO2 bind and regulate the relationship between the appellant and third respondent as shareholders too.

[125] As to the latter, I find it is not material, if not also inconsequential that the shareholder agreement is not executed by the third respondent. Equitable considerations and bargains have been upheld where there is a sufficient degree of agreement as held in *Re Westshield Ltd v. Waldron and others and Waldron and another* [2019] EWHC 115. Furthermore, in *Lim Kah Keng v. Teng Taim Sing & Ors* [2021] MLJU 1903 (HC), Anand Ponnudurai JC (now J) held as follows with emphasis added by me:

> [42] *The Plaintiff further submits, and I agree with such submission, that there is more than ample evidence to corroborate the Plaintiff's case that D4 was essentially a joint venture based on a relationship of probity, mutual trust, good faith and confidence. In this regard, I note there was no shareholders agreement drawn up prior to incorporation* and the Plaintiff contends that D4 is a quasi-partnership. As such, a higher standard of corporate governance must be observed by the majority shareholders (see the case of *Ebrahimi v. Westbourne Galleries*

> *Ltd* [1973] AC 360.) This higher standard for a joint venture has also been highlighted by the Singapore Court of Appeal in the case of *Lim Swee Khiang v. Borden Co (Pte) Ltd* [2006] 4 SLR(R) 745. (emphasis added)

See also *Mega Education Systems Sdn Bhd v. Ozone Glass Design Sdn Bhd* [2011] CLJU 1927; [2011] 1 LNS 1927; [2011] 6 MLJ 644 (HC).

In my view, the third respondent simply refused to execute the shareholders agreement so that it is not bound by the agreement.

[126] The learned Judicial Commissioner therefore again committed another misdirection here, particularly the failure to find that the agreement overrides the first respondent's constitution in respect of provision on management control.

[127] The collective misdirections of the learned Judicial Commissioner above in consequence warrant appellate intervention to redress the wrong inflicted upon the appellant. As a matter of fact, there was non-direction that tantamount to another misdirection by the learned Judicial Commissioner's failure altogether to give thought to the appellant's complaint pursuant to s. 346(1)(b) CA considered together with the second and/or third limb of *Ebrahimi v. Westbourne Galleries Ltd & Ors* (*supra*). The learned Judicial Commissioner is plainly wrong by having taken into account irrelevant factors as well as having excluded factors that ought to have been taken into account.

[128] As far as I am concerned, I am satisfied and accordingly find that the second and third respondents did not fairly deal with the appellant in good faith; hence the appellant has been discriminated and/or prejudiced that resulted in actionable oppression.

Conclusion

[129] For the foregoing reasons, appellate intervention is warranted and I will accordingly allow the appeal. Nonetheless, I noted the appellant prayed for the remedy that the third respondent shall sell its beneficial shares in the first respondent company to the appellant at a value to be determined by an independent valuer to be appointed by the court as proposed by the appellant to determine the purchase price; and *etc.* The court is plainly empowered to order the sale as provided in s. 346(2)(c) of the CA.

[130] Towards this end, I am perplexed by the second and third respondents' illogical accusation made in defence of the action that the appellant refused to permit their exit from the first respondent when it is plain the appellant is ready and willing to buy over their shareholding. That notwithstanding, I am mindful that the court rarely orders a buyout by the minority shareholder from the majority shareholder but I find this is a case which is justifiable to make the order on its special facts particularly when the majority shareholder itself wants to exit. In short, extraordinary circumstances warrant extraordinary measures when justice so dictates.

[131] Consequently, I will enter judgment in favour of the appellant in the following terms:

(i) it is declared that the third defendant had conducted itself in a manner that unfairly discriminated or otherwise prejudicial to the plaintiff and/or in regard of the interests of the plaintiff;

(ii) it is declared that the requisition notice is unlawful as the proposed resolution unfairly discriminates and/or is otherwise prejudicial to the plaintiff;

(iii) the third defendant is ordered to sell its beneficial shares in the first defendant company to the plaintiff at a value and on such terms to be determined by court; and

(iv) costs of RM50,000 to the plaintiff by each of the second and third defendants subject to allocatur.

[132] The order of the High Court dated 26 January 2023 is hereby set aside with costs to be paid by the second and third respondents subject to the allocator. No order as to costs against the first respondent.